IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

TUESDAY, THE 9TH OCTOBER 2007 / 17TH ASWINA 1929

AS.No. 511 of 2001()

OS.629/1994 of PRL.SUB COURT,TRIVANDRUM
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APPELLANTS/DEFENDANTS:
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1. STATE OF KERALA, REPRESENTED BY THE SECRETARY TO GOVT., PUBLIC WORKS & TRANSPORT DEPT., GOVT. SECRETARIAT, THIRUVANANTHAPURAM.

2. THE SUPERINTENDING ENGINEER, NATIONAL HIGHWAY (CENTRAL) CIRCLE, THIRUSSUR.

BY GOVERNMENT PLEADER SRI V.T.K. MOHANAN

RESPONDENT/PLAINTIFF:

VARKEY MATHAI, AGED 52 YEARS, S/O.VARKEY, RESIDING AT ELLICKAPARAMBIL, MAMALA, KOCHIN, THIRUVANIYOOR VILLAGE,KUNNATHUNADU TALUK.

BY ADV. SRI.K.L.VARGHESE
SMT.SANTHA VARGHESE

THIS APPEAL SUIT HAVING COME UP FOR ADMISSION ON 09/10/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.R. RAMAN & V. K. MOHANAN, JJ.

CMP 3671/2001 & A.S. NO. 511 OF 2001

DATED THIS, THE 9TH DAY OF OCTOBER, 2007.

J U D G M E N T

Raman, J.

CMP 3671/2001 is a petition for condoning the delay of 372 days caused in filing the appeal.

2. This petition is supported by an affidavit filed by the Executive Engineer, NH (Bridge) Division, Ernakulam. The averments made in para 4 is to the effect that the District Government Pleader forwarded the certified copy of the judgment to the Executive Engineer, PWD, N.H. (Bridges) Division which was received in that Office on 28.11.2000. Thereafter, a copy of the same was forwarded to the Office of the Advocate General and that Office asked the Executive Engineer to forward the certified copy of the decree. But as to why decree copy was not applied earlier, no explanation is forthcoming. We are not fully satisfied that the delay is properly explained. However, since the learned Government Pleader pleaded that the delay may be condoned and the appeal be considered on merits, taking a lenient view in the matter, and considering the fact that the State is the appellant, the delay is condoned.

3. We heard the learned Government Pleader in the appeal. This is an appeal against the judgment and decree passed by the Sub Court, Ernakulam, on 5.11.1999 in O.S. No. 629/1994. The suit was instituted by the respondent herein for money alleged to be due for the work done by him. The suit claim is limited to two items namely, viz, cost of patch work done and release of amount recovered on the plea of non standard stack of metal as set out in the plaint. There is no dispute that work of strengthening the road N.H. 47 with Built up spray grout (BUSG) between 0/000 to 5/090 in Cochin Bye pass was awarded to the plaintiff (respondent herein) and there was a formal agreement entered into between the parties. During the course of this work and before it was fully completed, due to rain, pot holes were developed and therefore patch work of the pot holes was asked to be done by the plaintiff as an additional work. The plaintiff claimed that he has done such additional work of 8500 M^2. The appellant/defendant contended that such work was done only for an area of 3500 M^2. The appellant's contention was accepted as regards the area. The rate as set out is also accepted as Rs. 543.77 per 10 M^2. As such, the court below virtually accepted the contention of the appellant both regarding quantity as well as rate. The court below in para 10 of the judgment, while considering Issue Nos. 5,6 and 7 held that the plaintiff, in such circumstances, is entitled to Rs. 1,90,319.5 if not already paid. The

learned Government Pleader was not able to point out as to how the State is prejudiced by such finding, when the court below virtually accepted the contention of the State both regarding the area as well as the rate. Hence we find no ground to interfere with the finding so arrived at by the court below.

4. The next issue is regarding release of the amount recovered from the plaintiff for non standard stack of metal. Regarding the question as to whether permission was granted to the plaintiff for collection of matal in non standard stack because of the peculiar facts and circumstances, evidence was adduced and discussed by the court below while considering the issue Nos. 4 and 8 in para 11. It was the case of the plaintiff while examined as PW.1 that there was no sufficient space to collect the metal and hence he issued Ext. A9 letter to the Superintending Engineer. DW.1 issued Ext. B3(a) letter to the Assistant Executive Engineer recommending to allow the plaintiff to collect the metal in non-standard stack. Ext.B3(b) in turn was written by the Assistant Executive Engineer in accordance with the recommendations so made. Ext.B3(c) is a letter sent by the Executive Engineer, to the Superintending Engineer requesting to allow the plaintiff to collect materials in non-standard stack for want of sufficient site and that no rate shall be reduced on account of the collecting material in non-standard stack. It is admitted by DW.1 in the box that all of them

recommended to collect the metal in non-standard stack since they were convinced regarding the non availability of space to stack the materials. Ext. B3 further shows that in similar cases, no recovery was made by the Department.

5. In the light of the above evidence, it cannot be doubted that non-standard stacking of the materials was done with the prior sanction from the Department with an assurance that no deduction will be made since the Department was convinced that there was lack of facility to stack the materials which persuaded them to accept the request made by the plaintiff and allowed non-standard stacking of the materials. In such circumstances, the recovery made by the Department as rightly found by the court below is not justified.

Thus, the court below dealt with all the issues on which we do not find any reason to interfere with. The appeal lacks merits and it is dismissed in limine.

P.R. RAMAN,
(JUDGE)

V. K. MOHANAN,
(JUDGE)

knc/-

P.R. RAMAN &
V.K. MOHANAN, JJ.

A.S. NO. 511/2001
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J U D G M E N T

9TH OCTOBER, 2007.